Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

ST. TAMMANY PARISH,

Petitioner,

v.

OMNI PINNACLE, L.L.C. and
UNITED DISASTER RESPONSE, L.L.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Eleventh Amendment Immunity protects a political subdivision as an "arm of the state", thus, rendering it immune from suit in federal court, for purposes of Hurricane Katrina disaster recovery under the Stafford Act where all funding for the relief effort was allocated through the Louisiana's Governor's Office of Homeland Security and Emergency Preparedness, which maintained approval, auditing and oversight authority on the availability and use of the disaster relief funds and where payment on recovery would be made from funds deposited in the State's treasury.

2. Whether the Fifth Circuit Court of Appeals violated established Supreme Court authority when it held that St. Tammany Parish waived pendent appellate jurisdiction by not listing it as an issue on appeal.

PARTIES TO THE PROCEEDING

Petitioner is the Parish of St. Tammany, a political sub-division of the State of Louisiana.

Respondent, United Disaster Response, L.L.C., a Kansas corporation, is the plaintiff in the underlying litigation.

Respondent, Omni Pinnacle, L.L.C., a Louisiana corporation, is a defendant in the underlying litigation.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit has been published at 511 F.3d 476 and has been included in the Appendix as Appendix A.

The Opinion of the District Court for the Eastern District of Louisiana in *United Disaster Response, L.L.C. v. Omni Pinnacle, L.L.C., et al.*, has not been reported and has been included in the Appendix as Appendix B.

JURISDICTION

Petitioner filed a timely Petition for Rehearing, which was denied by the Fifth Circuit Court of Appeals on January 17, 2008. Appendix C. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eleventh Amendment to the United States Constitution

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Stafford Act

Sec. 403. Essential Assistance (42 U.S.C. 5170b)

(a) In general - Federal agencies may on the direction of the President, provide assistance essential to meeting immediate threats to life and property resulting from a major disaster, as follows:

***

(3) Work and services to save lives and protect property - performing on public or private lands or waters any work or services essential to saving lives and protecting and preserving property or public health and safety, including -

(A) debris removal;

***

(4) Contributions - Making contributions to State or local governments or owners or operators of private nonprofit facilities for the purpose of carrying out the provisions of this subsection.

Title 44 of the Code of Federal Regulations,
Section 206 - Federal Disaster Assistance
Subpart G - Public Assistance
Project Administration

§ 206.201 Definitions used in this subpart.

(a) *Applicant* means a State agency, local government, or eligible private nonprofit organization, as identified in Subpart H of this regulation, submitting an application to the Grantee for assistance under the State's grant.

***

(d) *Grant* means an award of financial assistance. The grant award shall be based on the total eligible Federal share of all approved projects.

(e) *Grantee* means the government to which a grant is awarded which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document. For purposes of this regulation, except as noted in § 202.202, the State is the grantee.

***

(k) *Subgrant* means an award of financial assistance under a grant by a grantee to an eligible subgrantee.

(l) *Subgrantee* means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

§ 206.202 Application procedures.

(a) *General.* This section describes the policies and procedures that we use to process public assistance grants to the States. Under this section the State is the Grantee. As Grantee you are responsible for processing subgrants to applicants under 44 CFR parts 13, 14 and 206, and your own policies and procedures.

(b) *Grantee.* You are the grant administrator for all funds provided under the Public Assistance grant program. Your responsibilities under this section include:

(1) Providing technical advice and assistance to eligible subgrantees;

(2) Providing State support for project identification activities to include small and large project formulation and the validation of small projects;

(3) Ensuring that all potential applicants are aware of available public assistance; and

(4) Submitting documents necessary for the award of grants.

(c) *Requests for Public Assistance (Request).* The Grantee must send a completed *Request* (FEMA Form 90-49) to the Regional Director for each applicant who requests public assistance. You must send *Requests* to the Regional Director within 30 days after designation of the area where the damage occurred.

Louisiana Homeland Security and Emergency Assistance and Disaster Act
(Louisiana Revised Statutes 29:721 et seq.)

LSA-R.S. 29:725H. State emergency and disaster agency; powers of the director.

The director, subject to the direction and control of the governor, shall be the executive head of the state homeland security and emergency preparedness agency and as such shall be responsible tot he governor for carrying out the programs for homeland security and emergency preparedness for the state of Louisiana. He shall coordinate the activities of all agencies and organizations for homeland security and emergency preparedness within the state and shall

maintain liaison with and cooperate with homeland security and emergency preparedness agencies and organizations of other states and the federal government. All state agencies and departments shall comply with directives from the Governor's Office of Homeland Security and Emergency Preparedness relating to emergency planning and operations.

LSA-R.S. 29:726. Governor's Office of Homeland Security and Emergency Preparedness; authority and responsibilities

A. The Governor's Office of Homeland Security and Emergency Preparedness, under the governor, shall be responsible for homeland security and emergency preparedness in the state . . .

B. The office shall prepare and maintain a homeland security and state emergency operations plan and keep it current, which plan may include any of the following:

***

(10) Coordination of federal, state and local homeland security, disaster and emergency activities.

(11) Coordination of the state operations plan with the homeland security and emergency plans

of other state agencies, local government, and the federal government.

***

E. The office shall either directly or through authorized assignment to another state agency or department:

***

(12) Cooperate with the federal government and any public or private agency or entity in achieving any purpose of this Chapter and in implementing programs for disaster emergency mitigation, preparation, response, and recovery.

LSA-R.S. 29:727. Powers of the parish president; penalties for violations

A. Each political subdivision within this state shall be within the jurisdiction of and served by the Governor's Office of Homeland Security and Emergency Preparedness for purposes of homeland security and emergency preparedness and by a parish homeland security and emergency preparedness agency responsible for emergency or disaster mitigation, preparedness, response, and recovery.

LSA-R.S. 29:729 B. Parish homeland security and emergency preparedness agency authorities and responsibilities

The parish office of homeland security and emergency preparedness shall prepare and maintain an all hazards emergency operations plan and keep it current, which plan may include any of the following:

***

(10) Coordination of federal, state, and local disaster or homeland security and emergency activities.

(11) Coordination of the state operations plan with the homeland security and emergency plans of other state agencies, local government, and the federal government.

STATEMENT OF THE CASE

A. Nature of the Case.

United Disaster Response, L.L.C. ("UDR") filed suit against Omni Pinnacle, L.L.C. ("Omni"), a debris removal contractor for Petitioner, St. Tammany Parish, State of Louisiana (hereinafter the "Parish"), and the Parish. The Parish filed a Rule 12(b) motion to dismiss the suit based upon Eleventh Amendment immunity and a forum selection clause in its contract with Omni, which is incorporated into Omni's subcontract with UDR. The clause specifically provides that any suit brought under the contract must be maintained exclusively in St. Tammany Parish courts.

B. Background.

In the wake of Hurricane Katrina, the greatest natural disaster ever to befall this country, Louisiana and its affected parishes began the long and painful process of literally picking up the pieces. Southeastern Louisiana was declared a disaster area and emergency assistance funds were made available to the State of Louisiana by the Federal Emergency Management Agency ("FEMA") through the Stafford Act, 42 U.S.C. § 5121, et seq. Federal disaster assistance under the Stafford Act is regulated at 44 C.F.R. § 206, et seq.

Federal funds were made available to the State of Louisiana by FEMA through Louisiana's Office of Homeland Security and Emergency Preparedness ("LOHSEP"). Under the Stafford Act, Louisiana is the Grantee of the federal disaster assistance funds. In

turn, the State of Louisiana was tasked with authorizing and administering the funds to sub-grantees, including parishes and other political subdivisions.

The Parish, finding itself in total disarray in the aftermath of the Hurricane, applied for federal disaster assistance through the State of Louisiana (LOHSEP). The Parish's disaster relief request was in large part for clean-up and debris removal. Under the auspices of LOHSEP, the State of Louisiana approved, oversaw and administered federal funds for debris removal in the Parish. Requests of funding for debris removal by the Parish to FEMA exceed $200 million.

Omni had a contract with the Parish which became effective in the case of a declared emergency. After Katrina, the Parish qualified for disaster assistance through LOHSEP in an effort to address the destruction and wreckage left by the storm. The Parish engaged Omni to provide debris removal services. The contract contains an express forum selection provision which reads: "The 22nd Judicial District Court for the Parish of St. Tammany shall be the court of original jurisdiction of any litigation originated under this contract." Further, the contract between the Parish and Omni stated that any and all subcontractors were to be bound by the general terms and conditions of the prime contract, including the forum selection clause. UDR's contract with Omni incorporates the forum selections clause.

In order to take on such a massive project, Omni contracted with numerous sub-contractors to assist with the debris removal project. One of these subcontractors was UDR. After not being paid for amounts UDR claims are due under its subcontract with Omni, UDR filed suit on September 18, 2006, in the Eastern District of Louisiana, naming Omni and the Parish as defendants.

C. Course of Proceedings.

The Parish responded to UDR's complaint by filing a Rule 12(b) Motion to Dismiss wherein it asserted immunity from suit in federal court under the Eleventh Amendment to the United States Constitution. The Parish's claim of Eleventh Amendment immunity stems from the fact that in the narrow scope of disaster recovery following Hurricane Katrina, the Parish is an "arm of the state" and, as such, it is entitled to immunity from suit in federal court.

The Parish also asserted that the forum selection clause included in its contract with Omni, to which UDR was bound, provided exclusive jurisdiction in the 22nd Judicial District Court for the Parish of St. Tammany. Omni, in its Answer to the Complaint, cross-claimed against the Parish, claiming breach of contract and unjust enrichment. Both Omni and UDR opposed the Parish's Motion to Dismiss.

On March 15, 2007, the trial court judge, Ivan L.R. Lemelle, denied the Parish's Motion to Dismiss, finding that the Parish was not an "arm of the state" in the context of disaster recovery for purposes of sovereign immunity under the Eleventh Amendment. See, Appendix B, at p. 18a. The trial court also ruled that the language of the

forum selection clause was permissive rather than exclusive. *Id.* at pp. 18a-19a. On March 26, 2007, the Parish filed its Notice of Appeal.

Around the time that the trial court was examining the Motion to Dismiss filed by the Parish, another judge in the Eastern District of Louisiana, Carl J. Barbier, examined a nearly identical suit brought by a different subcontractor of Omni. The Parish was made a party to that case. The Parish filed a Motion to Dismiss which raised identical issues of Eleventh Amendment immunity and lack of jurisdiction under the forum selection clause, both of which would prohibit suit in federal court. *Top Branch Tree Service v. Omni Pinnacle, L.L.C.*, CA No. 06-3723 (E.D.La. 2007). However, Judge Barbier's analysis of the exact same contractual forum selection language resulted in an opposite ruling, wherein he ruled that the language in the contract was mandatory and required that any suit against the Parish be filed in the Twenty-Second Judicial District Court for the Parish of St. Tammany. Based on the forum selection clause Judge Barbier dismissed the Parish from the *Top Branch* suit. Further, no party to the *Top Branch* litigation appealed the ruling making Judge Barbier's ruling a final judgment.

Following the trial court's denial of its Motion to Dismiss in the instant matter, the Parish appealed to the United States Fifth Circuit Court of Appeals under the collateral order doctrine. On appeal, the Parish argued that the Parish did qualify as an "arm of the state" under a six-part analysis outlined in the precedential Fifth Circuit case of *Delahoussaye v. City*

of New Iberia, 937 F.2d 144 (5th Cir. 1991).[1] Under *Delahoussaye* analysis, the six elements are not equal and, by far, the greatest factor the court must consider is the source of the Parish's funds. As it related to emergency disaster assistance, it was undisputed that the Parish received the entirety of its funds from the State treasury. Further, pursuant to the Stafford Act, the State was the administrator and coordinator of all of the activities and funds, and the State retained supervisory capacity over how the funds were allocated and used. The Parish also argued the clear and unambiguous meaning of the forum selection clause was mandatory in nature and divested the federal district court of jurisdiction to hear the case, particularly in light of the *Top Branch* decision.

Both Omni and UDR challenged the jurisdiction of the Fifth Circuit to hear the argument relating to the forum selection clause on appeal. In its reply memorandum, the Parish asserted that the Fifth Circuit did, in fact, have jurisdiction to consider the forum

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1. The six-part *Delahoussaye* test to determine whether an entity is an "arm of the state" for purposes of Eleventh Amendment Immunity is: (1) Whether the state statutes and case law view the entity as an arm of the state; (2) The source of the entity's funding; (3) The entity's degree of local autonomy; (4) Whether the entity is concerned primarily with local as opposed to statewide problems; (5) Whether the entity has authority to sue and be sued in its own name; and (6) Whether the entity has the right to hold and use property. 937 F.2d 147. See also, *Cozzo v. Tangipahoa Parish Council-President Govt.*, 279 F.3d 273 (5th Cir. 2002); *Anderson v. Red River Waterway Comm'n*, 231 F.3d 211 (5th Cir. 2000); *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986).

selection clause issue, under the doctrine of pendent appellate jurisdiction. Pursuant to *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), the Parish articulated that pendent appellate jurisdiction was proper if the two rulings were "inextricably intertwined" or if "review of the former decision was necessary to ensure meaningful review of the latter."

On December 17, 2007, the Fifth Circuit Court of Appeals issued its decision. The Fifth Circuit held that the Parish was not an "arm of the state" and stated: "This is not a case with such extraordinary circumstances that we can find that the parish is an 'arm of the state'". See, Appendix A, p. 4a. The Parish vigorously disagrees with this ruling on this de novo issue under the U.S. Constitution and application of the Eleventh Amendment through the Stafford Act in such an emergency as Hurricane Katrina. Because the State of Louisiana controls authorizing and use of all funding under the Stafford Act, the Parish is no more than an "arm of the state" for purposes of debris removal following Hurricane Katrina. This Court should intervene and decide this very important issue.

With respect to the forum selection clause issue, the Fifth Circuit held that the Parish waived pendent appellate jurisdiction by not having included it as an issue on appeal. The Fifth Circuit is plain wrong as such ruling is contrary to the decision of this Court in *Steel Company v. Citizens for a Better Environment.*

Believing the Fifth Circuit was in error in its December 17, 2007 finding that the Parish waived application of pendent appellate jurisdiction by not

including it as an issue for review, the Parish filed a Petition for Rehearing. The Fifth Circuit denied the Petition for Rehearing on January 17, 2008, without reasons. The denial of the Petition for Rehearing is attached as Appendix C.

REASONS FOR GRANTING THE PETITION

This suit presents an issue not previously considered by this Court relating to whether Eleventh Amendment immunity protects a political subdivision of the State a Louisiana in the narrow scope of Hurricane Katrina disaster recovery under the Stafford Act, where all approval, funding and coordination of disaster recovery operations is under the auspices of the State and where the political subdivision functions, for all intents and purposes, as an "arm of the state". If so, the subdivision is immune from suit in federal court and both the trial court and the Fifth Circuit are in error. Further, the Fifth Circuit's decision to not address the forum selection clause issue on appeal because the jurisdiction to do so was not listed as an issue on appeal is contrary to settled jurisprudence of this Court.

A. Eleventh Amendment Immunity protects a political subdivision as an "arm of the state" in disaster recovery efforts relating to Hurricane Katrina and administration of the Stafford Act, where all funding for the relief effort was allocated through the Louisiana's Governor's Office of Homeland Security and Emergency Preparedness, which maintained approval, auditing and oversight authority on the availability and use of the disaster relief funds, and where payment on recovery would be made by funds out of the State's treasury.

1. The State of Louisiana is the Grantee under the Stafford Act and responsible for relief efforts through LOHSEP.

The federal government provided disaster assistance to the State of Louisiana through the Stafford Act. Under the Stafford Act and its governing regulations, the State is the Grantee and is tasked with approving, allocating and administering all funding provided by the federal government for disaster recovery. The Parish is a sub-grantee, and the allocation of all funding comes through the State's treasury.

The State of Louisiana, as the Grantee under FEMA's Public Assistance Program, is "accountable for the use of the funds provided" and is considered the "entire legal entity even if only a particular component of the entity is designated in the grant award document." See, 44 CFR § 206.201(e). The State also serves as the "grant administrator for all funds provided under the Public Assistance grant program."

See, 44 C.F.R. § 206.202(e). The funding for all contracts the Parish entered into relating to disaster assistance or debris removal was entirely administered through the State treasury. All requests for assistance to FEMA flow through the State, as do all allocations from FEMA to any sub-grantee.

2. The Parish is an "arm of the state" in disaster recovery efforts under Louisiana's Homeland Security Act.

Under the Louisiana Homeland Security and Emergency Assistance and Disaster Act (the "Louisiana Homeland Security Act"), LSA-R.S. 29:721, et seq., the Parish has limited autonomy relating to hurricane recovery as it falls under direct State supervision.

The Louisiana Homeland Security Act states that each political subdivision within this State shall be within the jurisdiction of and served by LOHSEP. LSA-R.S. 29:727(A). Further, under the Louisiana Homeland Security Act, the Parish President is directed to establish an office of homeland security and emergency preparedness under the purview of LOHSEP to better enable coordination with federal and state agencies in disaster response. LSA-R.S. 29:729(B)(11).

The Stafford Act mandates that each State has its own public assistance administration plan for management and administration of grants of federal money for disaster relief. 44 C.F.R., Part 206.207. Under Louisiana's Public Assistance Administration Plan ("LPAAP"), LOHSEP through its Disaster Recovery Division Chief is responsible for "damage surveys,

collection of data and preparation of damage assessment reports as well as requests and justifications required for obtaining a Presidential Declaration and managing all Disaster Recovery Center Functions once a Presidential Disaster is declared." Once a Presidential Declaration of disaster has occurred, the State Public Assistance Officer is responsible for damage assessment of all areas and coordination of inspections by damage assessments teams and the FEMA Public Assistance Officer. The LPAAP specifically provides LOHSEP with the following authority:

> Responsibility for the overall direction and control (coordination and supervision) of damage assessment operations for the State and its political subdivisions;
>
> Administer and supervise the Public Assistance (PA) program;
>
> Submit Request for Public Assistance (RPA) to FEMA;
>
> Assist in determining applicant eligibility;
>
> Disburse Funds;
>
> Maintain financial records and accountability;
>
> Process reports;
>
> Request, respond and coordinate State/ Federal audits; and
>
> Review Project Worksheet(s) for accuracy, completeness and mitigation opportunities.

Further, under the LPAAP, the Governor's Authorized Representative ("GAR"): (i) has final review and approval of all projects and claims for payment to be submitted to FEMA; (ii) must certifiy that all work and costs submitted are in compliance with the agreement in place between the State of Louisiana and FEMA and that all requirements have been met; and (iii) must review and evaluate all documentation provided and certify that all recommended costs were incurred by the sub-grantee in the performance of eligible work in compliance with 44 C.F.R.

Thus, the Parish's autonomy is extremely limited under the Stafford Act, the Louisiana Homeland Security Act and the LPAAP. All project assessments and requests for funding must go through LOHSEP. Further, any request for extension of time for a FEMA funded Project Worksheet must also go through LOHSEP. In fact, LOHSEP is responsible for **any and every** application to FEMA for funding or assistance. Not only must the Parish go through LOHSEP for every request and communication with FEMA, but LOHSEP is also responsible for the administration and allocation of all disaster relief funds. The Parish receives zero dollars from FEMA in direct aid. All disaster assistance funding to the Parish funnels through the State which retains complete oversight over the approval, allocation and administration of the federal assistance funds.

The statutorily imposed lack of autonomy for the Parish coupled with the State's complete authority under the LPAAP in a Stafford Act disaster recovery situation in Louisiana leads to only one conclusion: the Parish is an "arm of the state" under the Eleventh Amendment.

3. Fifth Circuit's case law on Eleventh Amendment immunity was misapplied.

The Parish asserts that within the narrow scope of hurricane recovery and federal disaster assistance, it is an "arm of the state". Even though this issue is one of first impression, existing case law, particularly within the Fifth Circuit, supports the Parish's contention that it is immune from suit in federal courts.

It is axiomatic that Eleventh Amendment immunity encompasses not only the States themselves, but entities and instrumentalities deemed to be arms of the state. However, it is also established law that Eleventh Amendment immunity does not in and of itself extend to counties and parishes. See, *County of Lincoln v. Luning*, 133 U.S. 529 (1889). In the instant matter, the Fifth Circuit cited to *County of Lincoln* to support its ruling. The Fifth Circuit also relied heavily upon its decision in *Crane v. Texas*, 759 F.2d 412 (5th Cir.), amended in part on denial of rehearing, 766 F.2d 193 (5th Cir. 1985), and stated:

> We addressed this at length in *Crane v. Texas* (citations omitted), noting that the Supreme Court has repeatedly stated "that Eleventh Amendment does not apply to counties and similar municipal corporations." Id. at 415 (internal citations and quotations omitted). We went so far as to characterize the Court's statements as "unambiguous" and listed at length the "abundance of authority holding the Eleventh Amendment inapplicable to counties . . ." Id. at 416 (internal citations

> omitted). Holding that these "authorities . . . establish without question that Eleventh Amendment immunity does not, as a general rule, extend to counties," we further stated that "**no exception should be made to this rule without convincing evidence distinguishing the county in question from counties generally.**" Id. at 417. In deciding whether this "convincing" showing could be made, we noted that "the most crucial factor . . . is whether the funds to defray any award would be derived from the state treasury." Id.

See, Appendix A, pp. 4a-5a. (emphasis added).[2]

In the instant matter, the Fifth Circuit found that there were no extraordinary circumstances in that the Parish could not show with convincing evidence that it was distinguishable from parishes or counties generally.

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2. This Court's decision in *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), where a public university was found to be an arm of the state, buttresses the *Crane* exception as outlined by the Fifth Circuit. This Court in *Regents* stated:

> Of course, the question of whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued. *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 45-51 (1994) (additional internal citations omitted).

Id. at 430.

The Fifth Circuit relied on its decision in *Vogt v. Bd. of Commr's Orleans Levee Dist.*, 294 F.3d 684 (5th Cir. 2002), to support the ruling that there is "no formal requirement for Louisiana to pay a judgment to Omni or United, if such a judgment is rendered. The State may choose to reimburse the parish, but that is not enough." *Id.* at 693. See also, Appendix A, p. 9a. The Fifth Circuit then went on to further discuss the *Vogt* decision and stated that the State has no duty under Louisiana statutory and constitutional law to indemnify any judgment against its political subdivisions, including parishes. *Id.* However, the Fifth Circuit completely misconstrued the situation under which the instant litigation arose and failed to appreciate the language of the very decision it relied upon in *Vogt*.

In *Vogt*, the Fifth Circuit held that there is no "bright-line test" for the determination of an entity's status as an "arm of the state" for the purposes of Eleventh Amendment immunity from suit in federal court. *Id.* at 689. The matter is determined by reasoned judgment about whether the lawsuit is one which, despite the presence of a state agency as the nominal defendant, is effectively against the State. *Earles v. State Board of Certified Public Accountants of Louisiana*, 139 F.3d 1033, 1037 (5th Cir. 1998).[3]

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3. The Fifth Circuit has traditionally considered the six factors as outlined in *Delahoussaye*, discussed at FN 2. A defendant need not possess each of the above attributes to benefit from the Eleventh Amendment. *Hudson v. City of New Orleans*, 174 F.3d 677 (5th Cir. 1999). Nor are these factors necessarily equal in weight to one another. *Id.* at 682. It is well established that the second factor (the source of the entity's funding) is the most important. *Id.*

The Fifth Circuit's reliance upon *Vogt* was misapplied. The *Vogt* decision found that the State did not have a duty to indemnify its subdivisions, including parishes. 294 F.3d at 693. However, the Parish argues that for matters of disaster recovery and federal assistance in the aftermath of Hurricane Katrina under the Stafford Act, Louisiana Homeland Security Act and the LPAAP, the Parish is not a subdivision of the State but, rather, operates as an "arm of the state" for the purposes of implementation of clean up funded by federal grants to the States. It is clear that LOHSEP is the Grantee, must authorize any project for the Parish and administers all funding for such project. As such, the suit is effectively against the State of Louisiana.

4. The Court should decide this issue now because the Parish's status as an "arm of the state" for disaster relief operations will impact all political subdivisions which receive federal funds under the Stafford Act.

There has never been a natural disaster as catastrophic as Hurricane Katrina. The recovery effort has been a herculean task requiring cooperation amongst all levels of government. The existing federal disaster assistance policies and procedures under the Stafford Act provide that the State of Louisiana acts as Grantee of all funds. It approves, coordinates and administers all programs and funds so that the places within the State which are in need receive same. While the State administers and coordinates the allocation of funds, the Parish has little autonomy in how those funds are used. As such, the State is involved in every application, request for FEMA funding or appeal of

eligibility and funding determinations. Simply put, the State oversees and approves how the funds are applied for and used.

Because federal disaster assistance to the Parish is completely funded through the State, coupled with the State's oversight and administrative presence with how the funds are applied for and allocated, as outlined in the Louisiana Homeland Security Act and the LPAAP, the Parish must be considered an "arm of the state".

The implications of the Fifth Circuit's denial of Eleventh Amendment immunity to the Parish in this case are far reaching. The decision will allow the State of Louisiana to be sued in federal court via parishes performing disaster recovery under the supervision and administration of LOHSEP with judgments payable from the State treasury. Due to the Stafford Act's requirement that every State have a public assistance administration plan in place, it is likely that the Fifth Circuit's ruling will be applied in other jurisdictions to deprive other States of immunity from suit under the Eleventh Amendment. This Court must intervene now to assure that this does not occur and to hold safe the Constitutional rights of the State of Louisiana and all other States which receive disaster relief funding under the Stafford Act.

B. The Fifth Circuit Court of Appeals' holding that St. Tammany Parish waived pendent appellate jurisdiction by not listing it as an issue on appeal conflicts with established precedent of this Court.

The Fifth Circuit held that the Parish waived pendent appellate jurisdiction over the issue of enforcement of the forum selection clause in the contract between the Parish and Omni by not including pendent appellate jurisdiction as an issue to be addressed on appeal. See, Appendix A, pp. 12a-13a. This holding by the Fifth Circuit directly contradicts holdings of this Court. See, *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 118 (1998). The forum selection clause at issue goes directly to the question of whether the district court had jurisdiction to consider the case, and consideration of the forum selection clause is necessary to ensure a meaningful review of Eleventh Amendment immunity. See, *Swint v. Chambers County Commission*, 514 U.S. 35 (1995).

1. The Fifth Circuit was duty bound to examine its jurisdiction; the ruling is contrary to this Court's decision in *Steel Company v. Citizens for a Better Environment*.

The Fifth Circuit's decision is contrary to this Court's decision in *Steel Company v. Citizens for Better Environment*, 523 U.S. 83, 118 (1998). In *Steel*, this Court held that a court may not reach the merits of a case before determining whether or not jurisdiction to hear a claim exists. This Court stated:

> On every writ of error or appeal, the first and fundamental question is that of jurisdiction,

first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, *even when not otherwise suggested*, and without respect to the relation of the parties to it. *Great Southern Fire Proof Hotel Co. v. Jones*, *supra*, at 453, 20 S.Ct., at 691-692. The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of *95 the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884).

This Court's insistence that proper jurisdiction appear begins at least as early as 1804, when we set aside a judgment for the defendant at the instance of the losing plaintiff who had himself failed to allege the basis for federal jurisdiction. *Capron v. Van Noorden*, 2 Cranch 126, 2 L.Ed. 229 (1804). Just last Term, we restated this principle in the clearest fashion, unanimously setting aside the Ninth Circuit's merits decision in a case that had lost the elements of a justiciable controversy:

'*[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. Mitchell v. Maurer*, 293 U.S. 237, 244 [55 S.Ct. 162, 165,

> 79 L.Ed. 338] (1934). See *Juidice v. Vail*, 430 U.S. 327, 331-332 [97 S.Ct. 1211, 1215-1216, 51 L.Ed.2d 376] (1977) (standing).

Id. at 96 (emphasis added).

When questioned by Omni in its opposition brief as to the Court's basis to review the forum selection clause, the Parish responded and briefed the jurisdictional question in its reply and Omni countered in a sur-reply.[4] Relying upon its previous decision in *Cinel v. Connick*, 15 F.3d 1338 (5th Cir. 1994), the Fifth Circuit held that the Parish failed to raise pendent appellate jurisdiction in its initial brief and, therefore, it waived the argument. See, Appendix A, p. 13a. The Fifth Circuit failed to examine the fundamental question of its jurisdiction over the issue of the forum selection clause. Instead, the Court dropped a footnote stating that the Parish had waived pendent appellate jurisdiction by not addressing the issue in its appellate brief. *Id.* The ruling is completely inapposite to this Court's holding in *Steel*.

The Fifth Circuit misapplied the *Cinel* case in its ruling that the Parish had abandoned the issue of pendent appellate jurisdiction. The *Cinel* case concerned the failure of an appellant to raise an argument regarding why a lower court's decision should

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4. Appellate jurisdiction is raised in an appellant's brief under Rule 28 of the Federal Rules of Appellate Procedure, which requires that a jurisdictional statement provide a basis for the court of appeals' jurisdiction with applicable statutory provisions. The Parish met the requirements of Rule 28 in its brief and advised that the matter was to be heard under the collateral order doctrine.

not be overturned (i.e. assignment of error). That is a very different situation than the Parish's assertion of jurisdiction as an issue on appeal as a necessary threshold issue to consider the issue on which the trial court erred (i.e., the forum selection clause). The Parish concedes that there certainly exists case law in which an argument is deemed waived by the appellate courts if not identified as an issue on appeal. Importantly, however, they all concern raising and briefing errors of the lower court for review by the appellate court. There are no reported decisions, including *Cinel*, which hold that every basis for an appellate court's jurisdiction must be raised in an initial brief or else it is waived.

The Fifth Circuit abrogated its duty to examine the jurisdictional issue raised by the Parish as required by *Steel*. The duty is particularly relevant to the instant matter, because even a denial of Eleventh Amendment immunity does not necessarily ensure jurisdiction of the district court in light of the forum selection clause defense asserted by the Parish. Further, the forum selection clause was identified and fully briefed by all parties in briefs and at oral argument. The Fifth Circuit's finding that the Parish waived the pendent appellate jurisdiction argument flies in the face of this Court's precedent.

2. Under *Swint*, the forum selection clause must be addressed to give a meaningful review of the issues on appeal.

The Fifth Circuit relied upon its decision in *Louisiana Ice Cream Distributors, Inc. v. Carvel Corp.*, 821 F.2d 1031, 1032 (5th Cir. 1987), to find that "the denial of a motion to dismiss for improper venue is not a final order under 28 U.S.C. § 1291. Rather, it is an interlocutory order which is not subject to immediate appeal." See, Appendix A, p. 13a. The Fifth Circuit missed the entire point by holding that "[t]he facts in *Louisiana Ice Cream* are for all relevant purposes identical to those here. Therefore, we lack jurisdiction to review this aspect of the district court's decision, so that portion of the appeal is dismissed." *Id.* While *Carvel* did involve the denial of a motion to dismiss based upon a forum selection clause raised on appeal, the sole issue before that court was whether the appeal was properly within the bounds of the collateral order exception. **In *Carvel* there was no pendent appellate jurisdiction argued or possible.**

The seminal ruling by this Court on pendent appellate jurisdiction, which the Fifth Circuit failed to address, is *Swint v. Chambers County Commission*, 514 U.S. 35 (1995). The *Swint* decision limited pendent appellate jurisdiction by holding that when a federal appellate court reviews a district court decision on an interlocutory basis, it may not at the same time review unrelated questions that are not themselves entitled to expedited consideration. *Id.* at 51. While this decision limits pendent appellate jurisdiction, it does not close the door. This Court held that pendent appellate

jurisdiction is proper if the two rulings were "inextricably intertwined" or if "review of the former decision was necessary to ensure meaningful review of the latter." *Id.*

Both the Eleventh Amendment immunity argument and the forum selection clause argument go to the authority of the district court to exercise jurisdiction over the Parish. As such there can be no meaningful consideration of one without consideration of the other. The Fifth Circuit's refusal to review the district court's denial of the motion to dismiss on the forum selection clause issue renders the appeal of the Eleventh Amendment immunity issue meaningless and is contrary to this Court's ruling in *Swint*.

3. There now exists directly conflicting decisions amongst the lower courts in the Fifth Circuit on an identical issue.

Perhaps most troubling of all in the Fifth Circuit's decision to refuse to decide the issue of pendent appellate jurisdiction and the forum selection clause is that the lower court's decision in the instant matter is expressly contrary to a decision on the same contract made by another division of the same Court. That other decision is now a final judgment which absolutely contradicts the ruling in the instant matter.

The forum selection clause at issue reads: "The 22nd Judicial District Court for the Parish of St. Tammany shall be the court of original jurisdiction of any litigation originated under this contract."

In the instant matter, Judge Lemelle ruled:

> For a forum selection clause to be exclusive, it must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties' intent to make that jurisdiction exclusive. *City of New Orleans v. Municipal Administrative Services*, 376 F.3d 501, 504 (5th Cir. 2004). Here, the forum selection clause merely expresses the intent to recognize the 22nd Judicial District for the Parish of St. Tammany as a court of original jurisdiction. The instant clause does not demonstrate an intent to make that jurisdiction exclusive. Therefore, the forum selection clause does not divest this Court of original jurisdiction pursuant to 28 U.S.C. § 1332.

See, Appendix B, pp. 18a-19a.

Judge Barbier, in the *Top Branch* decision, took a very different interpretation of the same forum selection clause, and ruled:

> The clause in St. Tammany's General Conditions does not use the word "exclusive", and it does not specify venue or forum as distinct from jurisdiction. The contract provides that the 22nd Judicial District Court "shall be the court of original jurisdiction." The use of the mandatory word "shall" is not alone sufficient to make the provision mandatory. The Fifth Circuit has found that

a provision dictating that a specific court "shall have jurisdiction" is not mandatory. *Cladas & Sons, Inc. v. Willingham*, 17 F.3d 123, 127 (5th Cir. 1994). But there is an appreciable difference between the phrase "shall *have* jurisdiction" and the phrase "shall *be the* court of original jurisdiction." The first phrase allows for concurrent jurisdiction in other fora; the second does not. A similar difference can be observed in a phrase using the indefinite article "a", rather than the definite article, "the". If the 22nd Judicial District Court is *a* court of original jurisdiction, the jurisdiction of other courts is not necessarily excluded. However, if the 22nd Judicial District is *the* court of original jurisdiction, no other court is also a court of original jurisdiction. See, *Apotex Corp. v. Instituto Biologico Chemioterapico S.p.a.*, 2003 WL 21780965, *6 (N.D. Ill. 2003) (finding forum selection clause mandatory based on use of definite rather than indefinite article.) The use of the copula "be" and the definite article "the" indicate exclusivity, and does "more than establish that one forum will have jurisdiction.

"Courts are not captives of grammars and dictionaries. Neither are they free to ignore common usage and dictionary-tested meaning." *C.I.R. v. Kelley*, 293 F.2d 904, 912 (5th Cir. 1961) (relying on distinction between indefinite and definite article). The natural reading of General Condition 33.03 is that the parties accepted the 22nd Judicial District

> Court as the exclusive forum for litigation arising from the contract. Under the General Conditions, subcontractors such as Top Branch are also bound by this forum selection clause.

See, *Top Branch Tree Service & Landscaping, Inc. v. Omni Pinnacle, L.L.C., et al.*, No. 06-3723 (E.D. La. 2007), at pp. 5-7.

The Fifth Circuit's refusal to address the issue of the forum selection clause, even when presented with Judge Barbier's conflicting ruling, has created chaos and confusion in the lower courts. Rather than provide guidance on this issue for the lower Courts, the Fifth Circuit simply refused to consider it. How is justice served when the Parish has raised the same issue in two identical suits, dealing with an identical provision, and two polar opposite results have occurred?

4. The Court should decide the issue as the Fifth Circuit's ruling creates precedent which would allow an Appeal Court to disregard issues on appeal if it chooses not to fully examine its jurisdiction to hear an appeal.

The Fifth Circuit's holding that the Parish waived pendent appellate jurisdiction over the forum selection clause issue by not identifying pendent appellate jurisdiction as an issue to be addressed on appeal is a dangerous precedent. This Court has said repeatedly that it is the duty of an appellate court to examine its jurisdiction and the jurisdiction of the lower court. The Fifth Circuit's pronouncement to the contrary would

allow a party to deny (or grant) an appellate court jurisdiction by the wording of its brief. As stated by this Court in the *Steel* case, jurisdiction is the threshold consideration which an appellate court must resolve before considering the merits of the matter before it. The Fifth Circuit has failed to do this.

There now exists a situation in the Fifth Circuit where two lower courts have issued opposite rulings on the same language in the same contract, and when presented with the opportunity to clarify the issue, the Fifth Circuit refused to consider it. The sovereign rights of the State of Louisiana are at issue and jurisdiction of the district courts over the State via the Parish must be clarified by this Court.

The actions of the Fifth Circuit not only deprive the Parish of consideration of an issue that goes to the heart of the lower court's ability to hear the case, but diverges from established controlling law and precedent. This decision if allowed to stand will weaken the doctrine of pendent appellate jurisdiction and create a split in the circuits which will result in further confusion and a dilution of judicial economy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED DECEMBER 17, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-30348

UNITED DISASTER RESPONSE, LLC,

Plaintiff-
Counter Defendant-
Appellee,

v.

OMNI PINNACLE, LLC,

Defendant-
Cross Claimant-
Counter Claimant-
Appellee,

v.

ST. TAMMANY PARISH,

Defendant-
Cross Defendant-
Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

Appendix A

Before REAVLEY, SMITH, and GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Omni Pinnacle, LLC ("Omni"), contracted with St. Tammany Parish to perform post-hurricane repairs. Omni subcontracted with United Disaster Response, LLC ("United"). Alleging that additional payment was due, United sued Omni and the parish, and Omni counterclaimed against United and cross-claimed against the Parish. Citing the Eleventh Amendment, Louisiana state law, and a choice-of-forum clause in the contract, the parish moved to dismiss. The district court rejected the parish's arguments. We affirm in part and dismiss in part.

I.

The parish entered into a contract with Omni to help with repairs after a storm or other disaster. Omni then subcontracted with United. After hurricanes Katrina and Rita, the Parish called Omni—and, by extension, United—into action.

Because of a disagreement about the work provided, the parish made only partial payment to Omni, which in turn only partially paid United. Invoking diversity jurisdiction under 28 U.S.C. § 1332, United sued Omni and the parish for full payment; Omni counterclaimed against United and cross-claimed against the parish.

Appendix A

In response to United's and Omni's claims, the parish filed a Federal Rule of Civil Procedure 12(b) motion to dismiss. The parish argued that it had immunity under the Eleventh Amendment and Louisiana law and that the contract contains, by reference, a mandatory choice-of-forum clause stating that "[t]he 22nd Judicial District Court for the Parish of St. Tammany shall be the court of original jurisdiction of any litigation originated under this contract."

The district court denied the motion, ruling that the parish is not an "arm of the state" and that the choice-of-forum clause is not exclusive. The court did not address the state law argument. The parish appeals, basing appellate jurisdiction on the collateral order doctrine. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

II.

We review questions of immunity *de novo*. *United States v. Texas Tech Univ.*, 171 F.3d 279, 288 (5th Cir.1999). We do the same for constructions of choice-of-forum clauses. *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 301 (5th Cir.1998).

III.

We first confront whether the district court erred in failing expressly to apply the six-prong test of *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147

(5th Cir.1991).[1] The parish argues that under *Flores v. Cameron County*, 92 F.3d 258, 268 (5th Cir.1996), the court was required to apply *Delahoussaye* because "analogies between like entities cannot replace consideration of the six relevant factors." The district court did not err. This is not a case with such extraordinary circumstances that we can find that the parish is an "arm of the state" notwithstanding the holding in *County of Lincoln v. Luning*, 133 U.S. 529, 530, 10 S.Ct. 363, 33 L.Ed. 766 (1889), that "the Eleventh Amendment limits . . . jurisdiction only as to suits against a state" and not against counties and parishes.

We addressed this issue at length in *Crane v. Texas*, 759 F.2d 412 (5th Cir.), *amended in part on denial of rehearing*, 766 F.2d 193 (5th Cir.1985), noting that the Supreme Court has repeatedly stated "that the

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1. Because "[t]here is no bright-line test for determining whether a political entity is an 'arm of the State' for purposes of Eleventh Amendment immunity," *Vogt v. Bd. of Commr's Orleans Levee Dist.*, 294 F.3d 684, 689 (5th Cir.2002), in *Delahoussaye*, 937 F.2d at 147, we held that courts should consider six factors:

> (1) whether state statutes and case law characterize the agency as arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

Eleventh Amendment does not apply to counties and similar municipal corporations." *Id.* at 415 (internal citations and quotations omitted). We went so far as to characterize the Court's statements to be "unambiguous" and listed at length the "abundance of authority holding the Eleventh Amendment inapplicable to counties . . . ." *Id.* at 416 (internal citations omitted). Holding that these "authorities . . . establish without question that Eleventh Amendment immunity does not, as a general rule, extend to counties," we further stated that "no exception should be made to this rule without convincing evidence distinguishing the county in question from counties generally." *Id.* at 417. In deciding whether this "convincing" showing could be made, we noted that "the most crucial factor . . . is whether the funds to defray any award would be derived from the state treasury," *id.* (internal citations and quotations omitted), but even then we took special care to emphasize the need for "payment of the judgment . . . to be made *directly* from the state treasury," *id.* (internal citations and quotations omitted). This is a demanding standard.[2]

Though the district court should have more pellucidly explained why the parish was not entitled to immunity, the court was not mistaken in denying the

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2. It is so demanding, in fact, that the parish cites no case in which a county or parish was held to be an arm of the state. Given this dearth of supportive caselaw, it is not surprising that "[i]t is settled law that the parishes are not protected from suit by the eleventh amendment." *United States v. St. Bernard Parish*, 756 F.2d 1116, 1126 (5th Cir.1985).

motion to dismiss: The parish cannot show with "convincing evidence" that it is distinguishable from parishes or "counties generally."

The parish properly concedes some of the *Delahoussaye* factors. For instance, the parish can sue and be sued in its own name and can hold and use property. Likewise, Louisiana law does not characterize the parish as an arm of the state.[3]

For *Delahoussaye* factors three and four, the factors relating to the parish's autonomy and scope of authority,

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3. The parish, a "political subdivision" under Louisiana law, only indirectly concedes this factor, but

> [t]he statutory classification of . . . "political subdivisions" is significant. Our decision in *Cozzo [v. Tangipahoa Parish Council*, 279 F.3d 273, 281-82 (5th Cir.2002)] suggests that "political subdivision" . . . and "arm of the state" are mutually exclusive. While this may not be a hard-and-fast rule, virtually every other government entity classified as a political subdivision has been denied Eleventh Amendment immunity . . . . Moreover, political subdivisions are not part of any department within the executive branch of government. In every recent case in which a Louisiana political entity has been held to be an "arm of the state," the state agency being sued was part of a department within the executive branch.

Vogt, 294 F.3d at 692.

the parish attempts to create a special[4] rule for hurricanes: Where a hurricane or another wide-scale disaster is involved, the parish is entitled to Eleventh Amendment immunity because of the Louisiana Homeland Security and Emergency Assistance and Disaster Act, LSA-R.S. §§ 29:721 *et seq.* The act states that "[e]ach political subdivision . . . shall be within the jurisdiction of and served by the Governor's Office of Homeland Security and Emergency Preparedness . . . and by a parish homeland security and emergency preparedness agency responsible for emergenc[ies] . . . ," *id.* § 29:727(A), and requires each parish's office of homeland security and emergency preparedness to coordinate with federal and state agencies, *id.* § 29:729(B)(11). The act also requires that parishes prepare emergency plans for various threats. *Id.* § 29:729.

The parish's argument is unconvincing. Merely requiring the parish and the state to cooperate does not transform the parish into the state, and the parish offers no cases to support the contrary conclusion. The degree of state intrusion into the parish's autonomy is not dramatic. The act explains that "[t]he parish office of homeland security and emergency preparedness under the parish president, shall be responsible for homeland security and emergency preparedness in the parish," *id.* § 29:729(A); "[e]ach parish office of homeland security and emergency preparedness . . . shall have a

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4. The parish acknowledges that it "generally enjoys independent management of Parish affairs."

director . . . [who] shall serve at the pleasure of the parish president," *id.* § 29:728(A); and the director "shall have direct responsibility for the organization, administration, and operation of such local organization for homeland security and emergency preparedness," with the governor merely having "general direction and control," *id.* § 29:728(C). The act does not make the parish an arm of the state.

The parish's argument that it is concerned with statewide problems under the fourth *Delahoussaye* factor suffers from additional flaws. In *Vogt*, 294 F.3d at 695, a case concerning a levee district, we stated that "[l]imited territorial boundaries suggest that an agency is not an arm of the state" and "most entities that are entitled to Eleventh Amendment immunity have statewide jurisdiction." The parish obviously has a limited territorial boundary. *Vogt* forecloses another of the parish's arguments, that somehow its efforts facilitate statewide recovery and thus render the it an arm of the state: "The levee board's counter-argument is that the levee district is concerned with a statewide problem—flooding-and that the nature of the problem outweighs the narrow geographic boundaries of the levee district. However, primary education and law enforcement are also statewide concerns, yet school boards and sheriffs are not arms of the state." *Id.*

Thus, the parish's only real hope is the second *Delahoussaye* factor: the source of funds used. The parish argues that because all of its hurricane recovery funds come from the federal government, channeled

through the state, it is an arm of the state. But this is incorrect. There is no formal requirement for Louisiana to pay a judgment to Omni or United, if such a judgment is rendered. The state may choose to reimburse the parish, but that is not enough. *Vogt*, 294 F.3d at 693.

As we explained in *Vogt*, under Louisiana statutory and constitutional law the state has no duty to indemnify any judgment against its political subdivisions, including parishes. Id. "Although the legislature has the authority to appropriate funds to pay a judgment against a [political subdivision], the legislature certainly has no legal obligation to do so. Thus, no legal liability arises against the state in the event of a judgment against [a political subdivision] or its officers." *Id.* Such a "request" for "state money [to] be appropriated to pay the judgment [is] too speculative for Eleventh Amendment analysis." *Id.*[5]

IV.

The parish contends that Louisiana law protects it from suit in a federal court sitting in diversity.[6]

5. In *Vogt*, 294 F.3d at 693, we did note that "[w]e have left open the possibility that a state entity could show that the legislature—even where it is not obliged to do so-regularly appropriates money to pay judgments against the entity." The parish does not argue that there is a regular practice of the state's paying the parish's judgments, so we need not consider that question.

6. Though the collateral order doctrine gives us jurisdiction to consider the parish's Eleventh Amendment claims, *see e.g.*,

(Cont'd)

A Louisiana statute provides that "[n]o suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court." LSA-R.S. § 13:5106(A). From this, the parish argues that it cannot be sued in federal court.

The parish's contention is nearly frivolous. We have already addressed the same issue involving the same statute. In *In re Allied-Signal, Inc.*, 919 F.2d 277 (5th Cir.1990), we decided "whether a political subdivision, which pursuant to state statute [*i.e.* § 13:5106(A)] may be only sued in the state courts of Louisiana, and which, we assume, does not enjoy Eleventh Amendment immunity, may be sued in federal district court under diversity of citizenship jurisdiction." *Id.* at 278.

(Cont'd)

P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) ("We hold that States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity."), we must decide whether the doctrine also gives us jurisdiction over this state law argument, which, though similar to Eleventh Amendment immunity, is not identical to it. Under *Cohen*, there is collateral jurisdiction if the interlocutory order conclusively determines the disputed question, resolves an important issue separate from the merits, and cannot be effectively reviewed on appeal from a final judgment. The reasoning of *Puerto Rico Aqueduct*, 506 U.S. at 144, 113 S.Ct. 684, applies here: If "a State and its 'arms' are, in effect, immune from suit in federal court, it follows that the elements of the . . . collateral order doctrine are satisfied." Therefore, we have jurisdiction over this question.

Notwithstanding *Erie*,[7] we held that such suits can be brought in federal court.[8] "[P]olitical subdivisions that have waived common law immunity, but that do not enjoy Eleventh Amendment immunity under federal law, can be sued in federal courts under diversity jurisdiction without regard to state statutory provisions to the contrary." *Id.* at 280 n. 4 (citing *Chicot County v. Sherwood*, 148 U.S. 529, 533-34, 13 S.Ct. 695, 37 L.Ed. 546 (1893)).[9] *Allied-Signal* is on point here.[10]

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7. *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

8. It is "clear . . . that governmental units not covered by the Eleventh Amendment are suable in federal court, even in actions based solely on diversity jurisdiction. Thus, even when a state creates governmental units that it wishes to be immune from suit in federal court, a federal court may disregard the state's wishes." 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3524 (2d ed.1987), at 213-14. *See also Markham v. City of Newport News*, 292 F.2d 711, 718 (4th Cir.1961) ("It would be quite foreign to the *Erie* doctrine . . . to apply a state statute in such a way as to deny all relief in a federal court to a nonresident plaintiff on a cause of action which, clearly, the state courts could recognize and enforce. *Erie* requires that the federal court grant or withhold relief as the state courts would. It does not require relegation of the diversity jurisdiction to the mercies of the legislatures of fifty separate states.").

9. *See also N.Y. Life Ins. Co. v. Plaquemines Parish Comm'n Council*, No. 91-0909, 1991 WL 161512, at *2 (E.D.La. Aug.13, 1991) ("The fault with Plaquemine Parish's argument is that it never had Eleventh Amendment immunity . . . . Plaquemines

(Cont'd)

V.

The parish's final argument is that the district court misconstrued the contract's choice-of-forum clause, which the parish argues allows suit to be brought only in the parish's 22nd Judicial District Court. Because, however, this is an interlocutory appeal, we do not have jurisdiction to consider the issue.

Under 28 U.S.C. § 1291, unless one of the limited exceptions to the final judgment rule applies, we can review only "final decisions." One such exception is the collateral order doctrine. The parish attempts to invoke

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(Cont'd)
Parish is a 'political subdivision' of the State of Louisiana. Plaquemines Parish is not an arm of the state immune from suit in federal court under the Eleventh Amendment. Therefore, Plaquemines Parish may be sued in federal court under diversity jurisdiction notwithstanding State statutory provisions, such as § 13:5106(A), that purport to limit the waiver of common law immunity to state court actions.").

10. The Parish puts far too much weight on the fact that *Allied-Signal* involved a petition for writ of mandamus. The district court in *Allied-Signal* remanded to state court, after removal, "expressly and affirmatively bas[ing] its decision to remand on 13:5106(A)." *Allied-Signal*, 919 F.2d at 280. We granted mandamus "to correct [the] district court's remand order and [to] require it to entertain an action when it has been expressly and incorrectly remanded." *Id.* at 281. Thus, we directly ruled on the merits of § 13:5106(A).

that exception as a basis for appellate review of the choice-of-forum determination.[11]

Precedent, however, forecloses the parish's argument. In *Louisiana Ice Cream Distributors, Inc. v. Carvel Corp.*, 821 F.2d 1031 1032 (5th Cir.1987), we considered a contract with a choice-of-forum clause stating "that 'New York shall be a forum where any cause of action arising under this Agreement may be instituted.'" *Id.* at 1032. There, plaintiff sued in the Eastern District of Louisiana. The defendant unsuccessfully moved under Federal Rule of Civil Procedure 12(b)(3) to dismiss for improper venue.

On interlocutory appeal, we held that "[t]he denial of a motion to dismiss for improper venue is not a final order under 28 U.S.C. § 1291. Rather, it is an interlocutory order which is not subject to immediate appeal." *Id.* We likewise held that the matter did not "fall[ ] within the ambit of the collateral order doctrine." *Id.*

The facts in *Louisiana Ice Cream* are for all relevant purposes identical to those here. Therefore, we lack

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11. Likely realizing that its collateral order doctrine argument is flawed, the parish asserts in its reply brief that this court has pendent appellate jurisdiction over the denial of the motion to dismiss on the choice-of-forum clause. That argument is waived. *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir.1994) ("An appellant abandons all issues not raised and argued in its initial brief.").

jurisdiction to review this aspect of the district court's decision, so that portion of this appeal is dismissed.[12]

The order denying the motion to dismiss is AFFIRMED, and the appeal of the order regarding the choice-of-forum clause is DISMISSED.

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12. After the district court ruled in this case, another judge in the same district, in *Top Branch Tree Serv. & Landscaping, Inc. v. Omni Pinnacle, LLC*, No. 06-3723, 2007 WL 1234976 (E.D.La. Apr.26, 2007), dismissed a similar claim against the parish based on the same choice-of-forum clause. The Parish argues that *Top Branch* should have collateral estoppel—mistakenly labeled res judicata—effect here. That is incorrect. Because our jurisdiction under the collateral order doctrine is "extraordinarily limited," *Anchor Hocking v. Willamette Indus., Inc.*, 694 F.2d 1041, 1042 (5th Cir.1983), and because collateral estoppel is a nonjurisdictional affirmative defense, 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 132.05[8](a) (3d ed.1999), we do not have jurisdiction to address the collateral estoppel effect—if any—of *Top Branch*.

APPENDIX B — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED MARCH 14, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 06-6075

SECTION B(1)

UNITED DISASTER RESPONSE, LLC

VERSUS

OMNI PINNACLE, LLC, ET AL.

ORDER AND REASONS

Before the Court is Defendant St. Tammany Parish's Motion To Dismiss (Rec. Doc. No. 10). After review of the pleadings, attachments, and applicable law, and for the reasons that follow,

IT IS ORDERED that St. Tammany Parish's Motion To Dismiss is **DENIED.**

Appendix B

BACKGROUND

Plaintiff United Disaster Response ("UDR") filed suit asserting claims of breach of contract, *quantum meruit,* unjust enrichment and/or fraudulent misrepresentation, *inter alia* against Defendants Omni Pinnacle, L.L.C. ("Omni") and St. Tammany Parish. Plaintiff further asserts federal jurisdiction pursuant to 28 U.S.C. § 1332.

Defendant Omni contracted with Defendant St. Tammany Parish to perform debris removal and disposal. ("Parish Contract"). Subsequently, Omni subcontracted UDR to perform a portion of the work under the Parish Contract. ("Subcontract"). Plaintiff claims Defendants failed to tender payment for work performed.[1]

Defendant St. Tammany Parish claims immunity under the Eleventh Amendment to the United States Constitution. St. Tammany Parish further contends all contracts at issue contain an enforceable forum selection clause naming the 22nd Judicial District for the Parish of St. Tammany as the required forum. Therefore, St. Tammany Parish contends this Court lacks personal and subject matter jurisdiction and moves the Court to dismiss it from this proceeding pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

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1. Omni filed a cross-claim against St. Tammany Parish for its alleged failure to tender payment for work performed under the St. Tammany Contract.

Plaintiff UDR contends St. Tammany Parish is not an "arm of the state" and, therefore, is not immune from suit in federal court under the Eleventh Amendment. Plaintiff further contends that the forum selection clause is permissive and does not afford exclusive jurisdiction to the 22nd Judicial District for the Parish of St. Tammany.

Defendant Omni re-urges Plaintiff's contentions and further contends that the forum selection clause was adhesionary and is unreasonable. Therefore, Omni contends the forum selection clause is unenforceable.

DISCUSSION

Defendant St. Tammany Parish claims this Court lacks personal and subject matter jurisdiction and moves the Court to dismiss Plaintiff's claims against it pursuant to Rules 12(b)(1) and 12(b)(2) of the Federal Rules of Civil Procedure.

A. Eleventh Amendment Sovereign Immunity

St. Tammany Parish contends it is immune from suit in federal court under the Eleventh Amendment to the United States Constitution. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against

> one of the United States by citizens of another State, or by citizens or Subjects of any Foreign State.

Eleventh Amendment sovereign immunity extends to the state itself or to an "arm of the state." *New York Life Insurance Co. v. Plaquemines Parish Commission Council,* 1991 WL 161512 (E.D.La.) (citing *Lake Estates Inc.*, 99 S.Ct. 1171 (1979)). Furthermore, Eleventh Amendment immunity does not apply to lesser political subdivisions. *Id.* (citations omitted).

St. Tammany Parish is a political subdivision and is not immune from suit in federal court under the Eleventh Amendment.

B. Forum Selection Clause

St. Tammany contends the forum selection clause divests federal court of jurisdiction over the instant cause of action. The forum selection clause provides "[t]he 22nd Judicial District for the Parish of St. Tammany shall be the court of *original* jurisdiction of any litigation originated under this contract."[2] (emphasis added).

"For a forum selection clause to be exclusive, it must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties'

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2. General Conditions For St. Tammany Parish, Section 33.03.

intent to make that jurisdiction exclusive." *City of New Orleans v. Municipal Administrative Services*, 376 F. 3d 501, 504 (5th Cir. 2004). Here, the forum selection clause merely expresses the intent to recognize the 22nd Judicial District for the Parish of St. Tammany as a court of original jurisdiction. The instant clause does not demonstrate an intent to make that jurisdiction exclusive. Therefore, the forum selection clause does not divest this Court of original jurisdiction pursuant to 28 U.S.C. § 1332.

The Court finds St. Tammany Parish is not immune from suit in federal court under the Eleventh Amendment and further finds the forum selection clause does not divest this Court of jurisdiction. Accordingly,

IT IS ORDERED that St. Tammany Parish's Motion To Dismiss is **DENIED.**

New Orleans, Louisiana this 14th day of March, 2007.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 17, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-30348

UNITED DISASTER RESPONSE LLC

Plaintiff - Counter Defendant - Appellee

v.

OMNI PINNACLE LLC;

Defendant - Cross-Claimant - Counter Claimant - Appellee

v.

ST TAMMANY PARISH

Defendant - Cross Defendant - Appellant

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

Appendix C

ON PETITION FOR REHEARING

Before REAVLEY, SMITH, and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

s/ Jerry Smith
United States Circuit Judge